TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1934

No. 885 7

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

WILLIAM ALBERT HARBISON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 22, 1934
CERTIORARI GRANTED APRIL 30, 1934

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 888

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

WILLIAM ALBERT HARBISON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 Before United States Board of Tax Appeals

Docket No. 54347

WILLIAM ALBERT HARBISON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

APPEARANCES:
For Taxpayer: J. E. MacCloskey, Jr., Esq.
For Comm'r.: J. Polk, Esq.

1931
Mar. 23—Petition received and filed. Taxpayer notified. (Fee paid.)
" 23—Copy of petition served on general counsel.
Apr. 6—Answer filed by general counsel.
" 10—Copy served—assigned General Calendar.

1932
Mar. 18—Hearing set April 26, 1932.
Apr. 22—Motion to amend answer embodying amendment filed by general counsel. April 23, 1932, copy served.
" 23—Motion to consolidate with docket 54346 filed by taxpayer.
" 26—Hearing had before Mr. Smith on merits. Petitioner moves to consolidate with docket 54346—granted. Submitted. Briefs due in 60 days. Stipulation of facts filed.
June 20—Transcript of hearing April 26, 1932, filed.
June 24—Brief filed by taxpayer.
2 June 25—Brief filed by general counsel.
July 13—Motion of April 22, 1932, granted.
Aug. 29—Findings of fact and opinion rendered, Mr. Smith, division 5. Judgment will be entered under rule 50.
Sept. 14—Petition for rehearing filed by general counsel. September 19, 1932, denied.
Nov. 2—Motion for rehearing filed by general counsel.
" 7—Order that motion for rehearing be denied entered.
Dec. 12—Order that order denying respondent's motion of November 7, 1932, be vacated; that motion of respondent be granted and proceeding be set for rehearing January 25, 1933, entered.
" 27—Motion that Board vacate its order of December 12, 1932, and reinstate order of November 7, 1932, filed by taxpayer.

1933

Jan. 4—Order that order of the Board entered December 12, 1932, be vacated and set aside; that motion of respondent of November 2, 1932, for rehearing be denied entered.

" 25—Hearing had before Mr. C. P. Smith on settlement under rule 50. Continued to March 1, 1933.

" 25—Order that petitioner and respondent file notices of settlement with the Board pursuant to findings of fact and opinion promulgated August 29, 1932, by March 1, 1933, at which time hearing will be had thereon entered.

3 Feb. 4—Notice of settlement filed by general counsel. February 7, 1933, copy served.

Mar. 1—Hearing had before J. E. Murdock, division 3, on settlement under rule 50. Referred to Mr. Smith for decision.

" 7—Decision entered, Charles P. Smith, division 5.

June 6—Petition for review by United States Circuit Court of Appeals (2) with assignments of error filed by taxpayer.

" 6—Proof of service filed by taxpayer.

July 21—Motion for extension of time of 60 days to complete record filed by taxpayer.

Order enlarging time to October 4, 1933, for preparation of evidence and delivery of record entered.

Sept. 1[illegible]—Agreed statement of evidence lodged.

" 13—Motion that statement of evidence be approved filed by taxpayer.

" 14—Agreed statement of evidence approved and ordered filed.

" 16—Praecipe filed.

" 27—Proof of service filed.

4 Before United States Board of Tax Appeals.

Docket No. 54347

WILLIAM ALBERT HARBISON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition

Filed March 23, 1931

William Albert Harbison, petitioner above named, hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, Bureau symbols "IT:AR:A-2 FAJ-60D"; dated February 12, 1931, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual, whose full name is William Albert Harbison, with his residence, Sound View Avenue and Old Mamaroneck Road, White Plains, New York, and with his office at Graybar Building, 420 Lexington Avenue, New York City, New York, at which all tax matters are handled.

2. That notice of deficiency, a copy of which is hereto attached, made a part of this petition, and marked " Exhibit A ", was mailed to the petitioner on February 12, 1931.

3. The taxes in controversy are income taxes for the calendar year 1928; the deficiency claimed by the Commissioner of Internal Revenue for the year 1928 is $8,792.16.

4. The determination of the tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner of Internal Revenue erred in computing the gain on 1,000 shares of the common stock of Harbison-Walker Refractories Company sold by the petitioner during the year 1928, in that the Commissioner failed to base the computation on the difference between the selling price of the stock and the value of the same on May 11, 1925, which was the date of the termination of the trust created under the will of Samuel P. Harbison and was the time of the distribution of the said stock to the taxpayer.

(b) The Commissioner of Internal Revenue erred in computing the gain on the sale of the said 1,000 shares of the said Harbison-Walker Refractories Company common stock, in that the Commissioner based the gain on the difference between the selling price and the value of the said stock as of March 1, 1913.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) Samuel P. Harbison died May 11, 1905, leaving his last will and testament dated January 27, 1904, which was duly probated in the office of the register of wills, Allegheny County, Pennsylvania, on the 18th day of May 1905. A true and correct copy of the said will is hereto attached, made part of this petition, and marked " Exhibit B."

(b) The said Samuel P. Harbison owned a large number of shares of the common stock of the said Harbison-Walker Refractories Company and, in and by the said will, he devised practically all his property to his trustees, viz, Emma J. Harbison, Ralph W. Harbison, and your petitioner, William Albert Harbison, in trust to hold and manage the same for a period of twenty years from and after his death, and upon the termination of the trust, the will provided as follows:

" I give and bequeath to my said wife, Emma J. Harbison, one-third of my personal estate absolutely; to my son, William A. Harbison, one-third of my personal estate absolutely; to my son, Ralph W. Harbison, one-third of my personal estate absolutely."

(c) No inventory of the estate of Samuel P. Harbison was ever filed in court; no account was ever filed in court, and there never

was any decree of any court directing the distribution of said stock from the executors to the trustees.

(d) On May 11, 1925, the trust created under the said will terminated, and the said trust property including the said common stock of Harbison-Walker Refractories Company was distributed in accordance with the said will by the executors and trustees thereof, and your petitioner received one-third of the same, including
7 his share of the Harbison-Walker Refractories Company common stock hereinbefore referred to.

(e) On May 19, 1925, Harbison-Walker Refractories Company paid a stock dividend of 33⅓% to the holders of common stock.

(f) The market value of the common stock of Harbison-Walker Refractories Company on May 11, 1925, including the rights to the stock dividend, was $140.00 a share; giving allowance to the receipt of the stock dividend of 33⅓% on May 19, 1925, the market value on May 11, 1925, of the 1,000 shares of the common stock of the Harbison-Walker Refractories Company which were sold by your petitioner was $105.00 per share.

(g) The said 1,000 shares of common stock of the Harbison-Walker Refractories Company were sold by your petitioner during the year 1928 at the price of $150.00 per share.

Wherefore, the petitioner prays that this Board may hear the proceeding and that the said deficiency in the whole thereof assessed by the Commissioner be declared illegal and void.

J. E. MacCloskey, Jr.,
Counsel for Petitioner.
J. E. MacCloskey, Jr.,
1712 Farmers Bank Building, Pittsburgh, Pa.

8 [*Duly sworn to by William Albert Harbison, jurat omitted in printing.*]

9 *Exhibit A to petition*

[Copy]

NP–2–28

Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, Feb. 12, 1931.

Address reply to Commissioner of Internal Revenue and refer to

Mr. William Albert Harbison,
Graybar Building, 420 Lexington Avenue,
New York, New York.

Sir: You are advised that the determination of your tax liability for the year(s) 1928 discloses a deficiency of $8,792.16, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing

of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D.C., for the
10 attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner.
By (Signed) J. C. WILMER,
Deputy Commissioner.

Enclosures:
Statement.
Form 882.
Form 870.

STATEMENT

IT:AR:A-2.
FAJ-60D.

In re: Mr. William Albert Harbison, Graybar Building, 420 Lexington Avenue, New York, New York

Tax liability

Year	Tax liability	Tax assessed	Deficiency
1928	$17,384.24	$8,592.08	$8,792.16

Reference is made to the report of the internal-revenue agent in charge, 250 West 57th Street, New York, New York, covering an investigation of your tax liability for the year 1928, also your
11 protest thereto received by the agent October 21, 1930, and the records of a conference held in the agent's office November 25, 1930.

On the basis of the agent's report and information at hand in this office your income and tax liability have been adjusted as follows:

Net income including capital gain as shown on return	$94,901.13
Add: 1. Capital gain increased	80,750.00
Total	175,651.13
Less: 2. Contributions increased	11,249.57
Net income adjusted	164,401.56
Less: Capital gain adjusted ($45,013.52 plus $80,750.00)	125,763.52
Income subject to surtax	38,638.04

Less:		
Dividends	$114,782.50	
Credit for dependent	400.00	
		$115,182.50
Balance subject to normal tax		None
Surtax on $38,638.04		1,663.80
Tax at 12½% on $125,763.52		15,720.44
Total tax assessable		17,384.24
Tax previously assessed		8,592.08
Deficiency		8,792.16

12 Explanation of changes

1. The profit on the sale of 1,000 shares of Harbison Walker Refractories Company common stock has been adjusted as follows:

Selling price, 1,000 shares		$150,870.00
March 1, 1913, value $48.50 per share stock dividends reduce the above March 1, 1913, value to $24.25 per share.		
1,000 shares at $24.25	$24,250.00	
Commissions	856.48	
		25,106.48
Capital gain corrected		125,763.52
Capital gain reported		45,013.52
Capital gain increased		80,750.00

The above adjustment is in conformity with general counsel memorandum 6195, Cumulative Bulletin VIII–1, page 99. The stock in question was part of the residuary estate of Samuel P. Harbison, which under the will was set aside in trust for a period of twenty years. The trust could be terminated at any time prior to the twenty years by majority decisions of the trustees who were the beneficiaries of the residuary estate. The above trust terminated May 11, 1925, and the stock in question was received by the beneficiaries. In determining the gain or loss from the sale, you used as a basis the value as at May 11, 1925. This is not in conformity with general counsel memorandum 6195 and it is held that the value at the time of
13 distribution to the trust by the executors governs and this being prior to March 1, 1913, the March 1, 1913, value governs in the instant case.

2. Contributions as reported were limited to fifteen percent of the net income. They are now adjusted to conform to the above increase in income, and is the full amount as shown on schedule attached to the return.

Due to the fact that the statute of limitations will presently bar any assessment of additional tax against you for the year 1928, the Bureau will be unable to afford you an opportunity under the provisions of article 451 of Regulations 74 to discuss your case before mailing formal notice of its determination as provided by section 272 (a) of the Revenue Act of 1928. It is, therefore, necessary at this time to issue this formal notice of deficiency.

Exhibit B to petition

[Copy]

LAST WILL AND TESTAMENT

I, SAMUEL P. HARBISON, of the city of Allegheny, in the county of Allegheny and State of Pennsylvania, do hereby make this my last will and testament, revoking all other wills by me at any time heretofore made.

First. I direct that all of my just debts shall be fully paid as soon as conveniently may be done after my decease, including my charity obligations for the current year, as shown by the charity
14 account in my personal account book, and what remains of the charity fund, as shown by said account, if any there be, I give and bequeath to my wife, Emma, to dispose of as she may deem best for charitable purposes. If my outstanding charitable obligations are in excess of the balance standing to the credit of the said charity account, the difference between the amount of the said obligations and the said balance shall be paid by my executors out of my personal estate.

Second. I give and bequeath to my wife, Emma, all my household furniture, useful and ornamental, horses, carriages, livestock, harness, and other stable furniture, absolutely, and the use of the homestead, embracing about ten acres of land on the western end of the Davis Avenue property, free of rent for her life, or so long as she desires to occupy the same as a home.

Third. All the rest, residue, and remainder of my estate, real, personal, or mixed, I give, devise, and bequeath to my executors hereinafter named, their heirs, successors and assigns, for the following uses and trusts, viz:

To hold and manage the same as a whole, and to invest and reinvest the same from time to time in such securities as in their judgment shall be deemed advisable, with full power in my said executors and trustees to sell any real estate, either at public or private sale, for such sums or prices as they may deem proper, and to execute, acknowledge, and deliver good and sufficient deeds, leases, and other assurances therefor without leave of court, and without any obligation upon the part of the purchaser to see to the
15 application of the purchase money; and upon the further trust, after deducting all taxes, charges or expenses whatsoever incident to the execution of this trust, pay over the net income, rents, issues, and profits thereof to my wife, Emma J. Harbison, and my two sons, William A. Harbison and Ralph W. Harbison, equally, that is to say, share and share alike, during the continuance of this trust.

The above trust shall continue for a period of twenty years from and after my decease unless sooner terminated as hereinafter provided, and upon the termination of this trust, I give and bequeath my said estate as follows:

I give and bequeath to my said wife, Emma J. Harbison, one-third of my personal estate absolutely; to my son, William A. Harbison, one-third of my personal estate absolutely; to my son, Ralph W. Harbison, one-third of my personal estate absolutely.

I give and bequeath all my real estate to my two sons, William A. Harbison and Ralph W. Harbison, their heirs and assigns, share and share alike, but subject to the following charge, to-wit: That they shall pay to my said wife, Emma J. Harbison, one-third of the net income derived from the said real estate during her natural life, and in the event of the sale of all or any part of the said real estate, one-third of the net income derived from the proceeds thereof during her natural life.

Should any one of the said devisees die during the continuance of this trust, then, in that event, as to the share of the one so dying, the trust shall terminate, and the said share shall be dis-
16 tributed to such person or persons as would be entitled to receive the same under the intestate laws of Pennsylvania had such devisee died seized of the same in his or her own right.

I further direct that if at any time during the continuance of this trust my said executors, or a majority of them, shall deem at best to terminate the said trust, the said trust may be terminated by a declaration in writing to that effect, and thereupon the said trust shall cease and determine, and the said estate shall be divided and distributed among my said wife, Emma J. Harbison, and my two sons, William A. Harbison and Ralph W. Harbison in the proportions above designated.

I have no provision in my will for any charitable bequests as I have during my life administered largely upon my own estate, and have, from year to year, given to the Lord's work, and other charities, as though it were my last. This course I expect to pursue so long as I may live. In leaving my estate to my family it is my hope that they may act upon the same principle, remembering that "the King's business requires haste", and that what we do for Him ought to be done quickly, so that should He come in my time or in your time we be not found with His money in our hands that ought to have been out doing service in His cause.

Fourth. I appoint my wife, Emma J. Harbison, executrix and trustee, and my two sons, William A. Harbison and Ralph W. Harbison, executors and trustees of this my last will and testament, and I direct that they shall file no inventory or account, and shall have absolute discretion in the settlement of my estate.

17 In witness whereof, I have hereunto set my hand and seal, this twenty seventh day of June, in the year of our Lord one thousand nine hundred and four.

SAMUEL P. HARBISON. [SEAL]

Signed, sealed, published and declared by the said Samuel P. Harbison as and for his last will and testament, in the presence of us, and of each other, who, at his request, and in his presence, and

in the presence of each other, have hereunto set our nomes as witnesses in due attestation thereof.

WILLIAM WALKER.
O. M. REIF.

Before United States Board of Tax Appeals

(Title omitted.)

Answer

Filed April 6, 1931

The Commissioner of Internal Revenue, by his attorney C.
18 M. Charest, general counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1, 2, and 3. Admits the allegations contained in paragraphs 1, 2, and 3.

4. Denies the respondent's notice of deficiency is based upon the errors alleged and set forth in paragraph 4.

5(a). Admits the allegation contained in paragraph 5(a).

5(b). Admits the allegations contained in paragraph 5(b).

5(c). For lack of information denies the allegations contained in paragraph 5(c).

5(d). Denies the allegations contained in paragraph 5(d).

5(e). Admits the allegations contained in paragraph 5(e).

5(f). Denies the allegations contained in paragraph 5(f).

5(g). Admits the allegations contained in paragraph 5(g).

Wherefore, it is prayed that the taxpayer's appeal be denied.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:
W. FRANK GIBBS,
Special Attorney, Bureau of Internal Revenue.

19 Before United States Board of Tax Appeals

Docket Nos. 54346, 54347

RALPH W. HARBISON, WILLIAM ALBERT HARBISON, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Motion to consolidate

Filed April 23, 1932

Come now both parties in the above-entitled proceedings, by their respective attorneys of record, and move that the Board consolidate

the above-entitled cases for hearing and decision and for reason state that the two appeals involve identical issues and can be disposed of on the basis of the same evidence.

(Signed) J. E. MacCloskey, Jr.,
Attorney for Petitioners.
(Signed) C. M. Charest,
General Counsel, Bureau of Internal Revenue.

Motion granted at hearing April 26, 1932.

20 Before United States Board of Tax Appeals

[Title omitted.]

Motion for leave to amend answer

Filed April 22, 1932

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, and moves the Board for leave to amend the answer in the above-entitled case heretofore filed to add the further paragraphs 5 (h) and 5 (i) and the prayer for an increased deficiency as follows:

5 (h). Alleges that the petitioner, William Albert Harbison had during the taxable year 1928 an "ordinary net income" of $66,634.87 as defined by section 101 (c) of the Revenue Act of 1928 but without any allowance of a deduction for contributions as provided by section 23 (n) of the Revenue Act of 1928; that the total amount of contributions made during the taxable year 1928 by the petitioner to organizations within the provisions of section 23 (n) of the Revenue Act of 1928 was $27,996.83; that William Albert Harbison elected to have the gain or loss on the sale of the common stock of Har-

21 bison-Walker Refractories Company taxed under the capital net gain and loss provisions of section 101 of the Revenue Act of 1928; that a deduction for contributions in the amount of $16,747.26 was claimed in computing the income on the original return and that in the deficiency letter the full amount of the total contributions made of $27,996.83 was allowed as a deduction.

5 (i). Respondent alleges that he erred in the computation of the amount of contributions allowable as a deduction in that he applied the 15% limitation to the total income, including capital gain, whereas the amount of the deductible contributions is by the provisions of the revenue act limited to 15% of the ordinary net income of the petitioner or to the sum of $9,996.23 and by reason of this error the income shown in the deficiency letter was understated in the amount of $18,001.60.

Wherefore, it is prayed that the Board redetermine the amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, plus the additional amount which arises from the correction of the error in the allowance of the

excessive deduction for contributions in the deficiency letter. Claim is hereby asserted by the increased deficiency resulting from such redetermination.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of Counsel:
JAMES K. POLK, Jr.,
Special Attorney, Bureau of Internal Revenue.

22 Before United States Board of Tax Appeals
[Title omitted.]

Stipulation as to facts

Filed Apr. 26, 1932

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys of record, that the following shall be considered to be the facts in these proceedings:

1. The petitioners, Ralph W. Harbison and William Albert Harbison were trustees and beneficiaries under a trust created by the will of their father, Samuel P. Harbison. The said Samuel P. Harbison died testate May 11, 1905, a true copy of his will being attached to the petition filed with the Board of Tax Appeals in each of the proceedings assigned docket numbers 54346 and 54347.

2. The trust created by paragraphs third and fourth of the will of Samuel P. Harbison was in existence and operation until May 11, 1925, at which time it terminated.

23 3. No inventory of the estate of Samuel P. Harbison was ever filed in court, no account was ever filed in court, and there never was any decree of any court directing the distribution of said stock from the executors to the trustees.

4. Including in the corpus of the trust created by the will of Samuel P. Harbison there were 24,692 shares of the common stock of the Harbison-Walker Refractories Company, this stock having a fair market value per share on March 1, 1913, of $48.50 and a fair market value on May 11, 1925, per share of $140.00. During 1920 there was received on the common stock of the Harbison-Walker Refractories Company held by the trust created by the will of Samuel P. Harbison a stock dividend of 50% and on May 19, 1925, an additional stock of the Harbison-Walker Refractories Company of 33⅓%. The fair market value of the shares of stock on May 19, 1925, after the issuance of the stock dividend, was $105 a share.

5. On May 12, 1925, one third of the stock formerly registered in the name of the estate of Samuel P. Harbison was trasferred on the books of the company to the name of Ralph W. Harbison and one third thereof to the name of William Albert Harbison and new stock certificates were delivered by the corporation to Ralph W.

Harbison and William Albert Harbison. During 1928, out of the shares of the stock of the Harbison-Walker Refractories Company so held by William Albert Harbison and Ralph W. Harbison,
24 certain shares were sold, namely, William Albert Harbison sold 1,000 shares receiving therefor a cash consideration of $150,870 and Ralph W. Harbison sold 998 shares and received a cash consideration therefor of $149,700.

6. William Albert Harbison had during the taxable year 1928 an "ordinary net income" of $66,634.87 as defined by section 101 (c) of the Revenue Act of 1928, but without any allowance of a deduction for contributions as provided by section 23 (n) of the Revenue Act of 1928. The total amount of contributions made during the taxable year 1928 by William Albert Harbison to organizations within the provisions of section 23 (n) of the Revenue Act of 1928 was $27,996.83. William Albert Harbison elected to have the gain or loss on the sale of the common stock of the Harbison-Walker Refractories Company taxed under the capital net gain and loss provision, section 101, of the Revenue Act of 1928. A deduction was claimed on the original return for contributions in the amount of $16,747.26, and the deduction for contributions was allowed by the Commissioner in the deficiency letter in the amount of $27,996.83.

These proceedings may be submitted upon the pleadings and this stipulation of facts without the introduction of further evidence, and each party allowed sixty days from the date of the Board's order pursuant hereto within which to file briefs.

(Signed) J. E. MacCloskey, Jr.,
Attorney for petitioners.
(Signed) by C. M. Charest,
General Counsel, Bureau of Internal Revenue.

25 Before United States Board of Tax Appeals

Docket Nos. 54346, 54347

Ralph W. Harbison, petitioner

v.

Commissioner of Internal Revenue, respondent

William Albert Harbison, petitioner

v.

Commissioner of Internal Revenue, respondent

Promulgated August 29, 1932

Findings of fact and opinion

Under section 113 (a) (5) of the Revenue Act of 1928, the basis for determining gain or loss upon the sale of personal property ac-

quired by will, upon the termination of a trust, is the fair market value of the property at the time of the distribution to the taxpayer in 1925.

In determining the 15 percent deduction for contributions within the purview of section 23 (n) of the Revenue Act of 1928, the taxpayer having realized a capital net gain during that year and having elected to have that gain taxed at the rate provided in section
26 101 (a) of the Revenue Act of 1928, the amount of the capital net gain should be excluded from the amount of the taxpayer's ordinary net income.

J. E. MacCloskey, Jr., Esq., for the petitioners.

James K. Polk, Esq., for the respondent.

These proceedings duly consolidated are for the redetermination of deficiencies in the petitioners' income tax for 1928 as follows:

Docket No.	*Deficiency*
54346	$11,976.34
54347	8,792.16

The petitioners allege that the Commissioner erred in computing the gain upon the sale of certain shares of stock upon the basis of its March 1, 1913, value instead of its value on May 11, 1925, when distributed to them. In Docket No. 54347 the Commissioner duly asserted claim for an increased deficiency, alleging that he had erroneously computed the 15 percent allowance for charitable contributions. The facts were stipulated.

FINDINGS OF FACT

The petitioners were trustees and beneficiaries of a trust created by the will of their father, Samuel P. Harbison, who died May 11, 1905. Insofar as material to our determination the decedent's will provided:

Third. All the rest, residue, and remainder of my estate,
27 real, personal or mixed, I give, devise and bequeath to my executors hereinafter named, their heirs, successors and assigns, for the following uses and trusts, viz:

"To hold and manage the same as a whole, and to invest and reinvest the same from time to time in such securities as in their judgment shall be deemed advisable, with full power in my said executors and trustees to sell any real estate, either at public or private sale, for such sums or prices as they may deem proper, and to execute, acknowledge, and deliver good and sufficient deeds, leases, and other assurances therefor without leave of court, and without any obligations upon the part of the purchaser to see to the application of the purchase money; and upon the further trust, after deducting all taxes, charges, or expenses whatsoever incident to the execution of this trust, pay over the net income, rents, issues, and profits thereof to my wife, Emma J. Harbison, and my two sons, William A. Harbison and Ralph W. Harbison, equally, that is to say, share and share alike, during the continuance of this trust.

"The above trust shall continue for a period of twenty years from and after my decease unless sooner terminated as hereinafter provided, and upon the termination of this trust, I give and bequeath my said estate as follows:

"I give and bequeath to my said wife, Emma J. Harbison, one-third of my personal estate absolutely; to my son, William A.
28 Harbison, one-third of my personal estate absolutely; to my son, Ralph W. Harbison, one-third of my personal estate absolutely.

"I further direct that if at any time during the continuance of this trust my said executors, or a majority of them, shall deem it best to terminate the said trust, the said trust may be terminated by a declaration in writing to that effect, and thereupon the said trust shall cease and determine, and the said estate shall be divided and distributed among my said wife, Emma J. Harbison, and my two sons, William A. Harbison and Ralph W. Harbison in the proportions above designated.

"Fourth. I appoint my wife, Emma J. Harbison, executrix and trustee, and my two sons, William A. Harbison and Ralph W. Harbison, executors and trustees of this my last will and testament, and I direct that they shall file no inventory or account, and shall have absolute discretion in the settlement of my estate."

The trust created by the decedent's will continued until May 11, 1925, when it terminated and the proptrty therein was distributed.

No inventory or account of the decedent's estate was ever filed in court, and there has been no court decree directing the distribution of the stock involved in these proceedings from the executors to the trustees.

Included in the corpus of the trust created by the will of the decedent were 24,692 shares of the common stock of the Harbison-Walker Refractories Co., which had a fair market value
29 of $48.50 per share on March 1, 1913, and a fair market value of $140 per share on May 11, 1925. A stock dividend of 50 percent was received upon this stock in 1920, and an additional stock dividend of 33⅓ percent was issued on May 19, 1925. After the issuance of the stock dividend on May 19, 1925, this stock had a fair market value of $105 per share.

On May 12, 1925, one-third of the stock thertofore registered in the name of the estate of Samuel P. Harbison was transferred on the books of the corporation to each petitioner and new stock certificates delivered to them. In 1928, petitioner William Albert Harbison sold 1,000 shares of this stock for a cash consideration of $150,870, and petitioner Ralph W. Harbison sold 998 shares of this stock for a cash consideration of $149,700.

The Commissioner reduced the March 1, 1913, fair market value of $48.50 per share to $28.25 per share on account of the stock dividends, and computed the gain upon the sales in 1928 upon that basis.

William Albert Harbison had during the taxable year 1928 an "ordinary net income" of $66,634.87 as defined by section 101 (c) of

the Revenue Act of 1928 but without any allowance of a deduction for contributions as provided by section 23 (n) of the Revenue Act of 1928. The total amount of contributions made during the taxable year 1928 by William Albert Harbison to organizations within the provisions of section 23 (n) of the Revenue Act of 1928 was $27,996.83. William Albert Harbison elected to have the gain or loss on the sale of the common stock of the Harbison-Walker
30 Refractories Co., taxed under the capital net gain and loss provision, section 101, of the Revenue Act of 1928. A deduction was claimed on the original return for contributions in the amount of $16,747.26, and the deduction for contributions was allowed by the Commissioner in the deficiency letter in the amount of $27,996.83.

OPINION

SMITH: The first issue, common to both dockets, is the proper basis for computing the gain upon the sale of certain stock in the taxable year. This stock was distributed to the petitioners on May 11, 1925, after the termination of the trust created under the will of the petitioners' father, who died May 11, 1905. The respondent contends that the basis is the March 1, 1913, value of the stock, whereas the petitioners contend that its value when distributed to them in 1925 is the proper basis. The basis for determining gain or loss from the sale or other disposition of property is prescribed by section 113 of the Revenue Act of 1928, which, insofar as material to our determination, is as follows:

"(a) (5) Property transmitted at death. If personal property was acquired by specific bequest, or if real property was acquired by general or specific device or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall
31 be the fair market value of the property at the time of the death of the decedent. *In all other cases if the property was acquired either by will or intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer.*" * * * [Italics supplied.]

In comparable cases arising under prior revenue acts the basis for computing gain or loss was the value of property when "acquired" or at the "time of acquisition", which terms have been interpreted to mean the value at the date of the decedent's death. See Brewster v. Gage, 280 U.S. 327, 50 Sup.Ct. 115, 117. In noting the change in the wording of sectoon 113 (a) (5) of the Revenue Act of 1928, the Supreme Court said:

"The Revenue Act of 1928, § 113 (a) (5) expressly established value at the time of the death of the decedent as the basis of calculation in respect of sales of personal property acquired by specific bequest and of real estate acquired by general or specific devise or

by intestacy, and in all other cases fixed fair market value at the time of distribution to the taxpayer as the basis. 45 Stat. 819 (26 U.S.C.A., § 2113). The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended. Ordinarily, statutes establish rules for the future, and they will not be applied retrospectively unless that purpose plainly appears. United States *v.* Magnolia Co., 276 U.S. 160, 162,
32 48 S.Ct. 236, 72 L.Ed. 509, and cases cited. There is no support for the suggestion that subdivision (5) expressed the meaning, or was intended to govern or affect the construction, of the earlier statutes."

The original change in the Revenue Act of 1928 was recommended to Congress by the Joint Committee on Internal Revenue Taxation in order "to make the basis certain and definite" and avoid the doubt as to what is meant by the date of acquisition. See report of joint committee—vol. 1, pp. 17, 74, 75. The Ways and Means Committee Report No. 2, page 18, 70th Congress, first session, indicates that it accepted the joint committee's recommendation and states that "the value on the date of death affords an equitable and more readily determinable basis."

The Senate Finance Committee Report No. 960, page 28, 70th Congress, first session, contains the following explanation respecting section 113 (a) (5), which was enacted as changed by the Senate:

"The decision by the Court of Claims in McKinney *v.* United States has caused confusion in the existing law as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate. The House bill in section 113 (a) (5) provides that in such cases the basis shall be the fair market value of the property at the time of the death of the decedent. In the same section the House bill provides the same basis shall be used where the property is sold by the beneficiary.

33 "It appears that the House bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's death can not properly be used as the basis, in the case of property transferred in contemplation of death where the donee sells the property while the donor is living.

"Accordingly, the committee has revised section 113 (a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's

death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain,
34 for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary."

The legislative history of this provision indicates that Congress intended to apply the provision—

"* * * In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of distribution to the taxpayer * * *"

to personal property not acquired by specific bequest but either under the will of the decedent or by reason of intestacy when sold by a taxpayer.

The petitioners acquired the stock in question under the terms of their father's will, after the termination of the trust. There was no specific bequest of this stock, which was a portion of the decedent's personal property. The basis with which we are concerned is not "the basis in the hands of the estate" but the basis to these taxpayers, which is the fair market value of the stock at the time of distribution to them on May 11, 1925. This value, properly adjusted to reflect the subsequent stock dividends, is stipulated to be $105 per share. The petitioners' gain upon the sale of the shares of stock in 1928 should be compared accordingly. Cf. Lane *v.* Corwin, Fed. — (2d) —, decided D.C., E.D., N.Y., July 5, 1932.

35 The petitioner in Docket No. 54347 elected to have his capital net gain upon the sale of the above stock taxed at the 12½ per cent rate provided in section 101 (a) of the Revenue Act of 1928. During the taxable year he made contributions in the amount of $27,996.83 to organizations within the purview of section 23 (n) of the Revenue Act of 1928. The second issue concerns only that petitioner and the computation of the allowable deduction for these contributions which is limited to "15 per centum of the taxpayer's net income as computed without the benefit of this subsection" (see section 23 [n]). By an amended answer the respondent alleges that he erroneously allowed the deduction of the total amount of these contributions, whereas the allowance should have been limited to 15 per cent. of this petitioner's net income, other than capital gains. The respondent duly asserts claim for the increased deficiency that may result from the recomputation of this deduction.

This petitioner, having elected to have his profit upon the stock sold taxed under the provisions of section 101 (a) of the Revenue Act of 1928, is subject to the tax imposed by that provision, which is determined as follows:

"* * * a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain."

"Ordinary net income", as used in connection with this pro-
36 vision "means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions." (See section 101 [c] [7].) In other words, when a taxpayer avails himself of the benefits of section 101 (a), he elects, in effect, to have his tax liability determined in two parts; first, upon the ordinary net income exclusive of his capital net gain, and, second, upon his capital net gain at the 12½ per cent. rate; the sum of the two constitutes the amount of his tax. Obviously, therefore, the amount of this petitioner's capital net gain should be excluded from the amount of his net income upon which to compute the 15 per cent. for deduction for contributions within the purview of section 23 (n). This last amount, stipulated as $66,634.87, is petitioner's "ordinary net income" as prescribed by sections 101 (a) and 21, computed without the benefit of subsection 23 (n), upon which to compute the 15 per cent. deduction. Cf. Hallie D. Elkins, 24 B.T.A. 572.

Judgment will be entered under rule 50.

37 Before United States Board of Tax Appeals

Docket No. 54347

WILLIAM ALBERT HARBISON, PETITIONER

v.

COMMISSIONER OF INTERNATIONAL REVENUE, RESPONDENT

Decision

Pursuant to the findings of fact and opinion of the Board in the above-entitled proceeding promulgated August 29, 1932, the respondent, on February 4, 1933, filed a notice of settlement with statement of recomputation attached. Hearing was had thereon on March 1, 1933, at which time the recomputation filed by the respondent was not contested. Wherefore, it is

Ordered and decided that there is a deficiency in tax for the year 1928 due from the petitioner in the amount of $930.56.

[SEAL] (Signed) CHARLES E. SMITH,
Member.

Entered Mar. 7, 1933.
Enter:
CPS: aa.

38 Before United States Board of Tax Appeals

[Title omitted.]

Petition for Review

Filed June 6, 1933

The taxpayer, William Albert Harbison, the petitioner in this cause, by J. E. MacCloskey, Jr., his counsel, hereby files his petition for a review by the Court of Appeals of the Second Circuit of the decision by the United States Board of Tax Appeals rendered on March 7th, 1933, determining a deficiency in the petitioner's Federal income taxes for the year 1928, in the amount of $930.56, and respectfully sets forth as follows:

I

The petitioner, William Albert Harbison, has his residence at Sound View Avenue and Old Mamaroneck Road, White Plains, New York, and is an inhabitant of White Plains, New York.

II

The controversy involves the proper determination of the taxpayer's liability for Federal income taxes for the calendar year 1928.

39 The Commissioner of Internal Revenue claimed a deficiency in the case of your petitioner on account of the profit arising from the sale of certain Harbison-Walker Refractories Company common stock; the Commissioner also claimed a deficiency for the same year in the income taxes of Ralph W. Harbison for the same reason. The said Ralph W. Harbison and your petitioner filed separate petitions to the Board of Tax Appeals for a redetermination of the deficiency set forth by the Commissioner in his notices of deficiency, the petition of the said Ralph W. Harbison being numbered 54346, and of the said William Albert Harbison, 54347. Subsequently, the two cases, by the consent of all parties, were consolidated.

In the case of William Albert Harbison, after the issue had been joined, the Commissioner of Internal Revenue filed an amended answer, alleging that the petitioner, William Albert Harbison, had during the taxable year 1928 an "ordinary net income" of $66,367.87, as defined by section 201 (c) of the Revenue Act of 1928, but without any allowance of a deduction for contributions as provided by section 23 (a) of the Revenue Act of 1928; that the total amount of contributions made during the taxable year 1928 by the petitioner to organizations within the provisions of section 23 (n) of the Revenue Act of 1928 was $27,996.83; that William Albert Har-

bison elected to have the gain or loss on the sale of the common stock of the Harbison-Walker Refractories Company taxed under the capital net gain and loss provision of section 101 of the Revenue Act of 1928; that a deduction for contributions in the amount
40 of $16,747.26 was claimed in computing the income on the original return and that in the deficiency letter the full amount of the total contributions made of $27,996.83 was allowed as a deduction and the Commissioner of Internal Revenue, in his amended answer, alleged that he erred in the computation of the amount of contributions allowable as a deduction in that he applied the 15% limitation to the total net income, including the capital gain, whereas the amount of the deductible contributions was alleged by the provisions of the Revenue Act to be limited to 15% of the "ordinary net income" of the petitioner, or to the sum of $9,996.23.

The Board of Tax Appeals decided the other issues involved in the consolidated case in favor of your petitioner, but decided that the charitable contributions of your petitioner should be limited to 15% of the "ordinary net income", excluding therefrom 15% of the "net capital gains", and ordered and decided on March 7th, 1933, that there was a deficiency in the tax for the year 1928 due from the petitioner in the amount of $930.56.

III

Subsequent to the rendering of this decision in the Harbison case, your honorable Board, by its decision on April 6th, 1933, in the case of Aaron Straus vs. The Commissioner of Internal Revenue, Docket No. 65091, overruled its decision in this Harbison case and stated that it, along with two other decisions, would no longer be followed, and held that the contribution deductions, limited to 15% of
41 the net income, to which a taxpayer is entitled under section 23 (n) of the Revenue Act of 1928, is not affected by his election to be taxed in accordance with section 201 (a)—the capital net gain provisions of the act.

IV

Your petitioner, being aggrieved by the conclusions of law in the findings and opinions of your honorable Board, and by its decision rendered pursuant thereto, desires to obtain a review thereof by the Court of Appeals of the Second Circuit.

V

ASSIGNMENTS OF ERROR

Your petitioner assigns as error the following acts and omissions of the Board of Tax Appeals:

1. The failure to allow as a deduction from the petitioner's gross income for the year 1928 the contributions or gifts which he made

exclusively for religious, charitable, scientific, literary or educational purposes to an amount which did not exceed 15% of the taxpayer's net income as computed in accordance with the Revenue Act of 1928.

2. The failure to include the net capital profits of the taxpayer as a basis for the computation of the fifteen per centum of the taxpayer's net income.

3. The holding that "ordinary net income", as used in con-
42 nection with section 101 (a) of the Revenue Act of 1928, means the net income computed in accordance with the provisions of this title after excluding all items of capital gains, capital loss and capital deductions.

4. The holding that when a taxpayer avails himself of the benefit of Section 101 (a), the amount of the taxpayer's capital net gain should be excluded from the amount of his net income upon which to compute the 15% deduction for contributions within the purview of Section 23 (n).

(Signed) J. E. MacCloskey, Jr.,
J. E. MacCloskey, Jr.,
Counsel for Petitioner,
1712 Farmers Bank Building, Pittsburgh, Pennsylvania.

[*Duly sworn to by Wm. Albert Harbison, jurat omitted in printing.*]

43 Before United States Board of Tax Appeals

[Title omitted.]

Statement of the evidence

Filed Sept. 14, 1933

The following is a statement of evidence submitted to the Board of Tax Appeals in the above mentioned case so far as is necessary to the assignments of error as filed, reduced to narrative form:

William Albert Harbison, the petitioner, is a resident of White Plains, New York, and, during the taxable year 1928 had an "ordinary net income" of $66,634.87, as defined by section 101 (c) of the Revenue Act of 1928, but without any allowance for a deduction for contributions as provided by section 23 (n) of the Revenue Act of 1928.

William Albert Harbison, during the taxable year 1928, had a "capital net gain" of $45.013.52, as defined by section 101 (c) of the Revenue Act of 1928, and elected to have this capital net gain taxed under the capital net gain provision, section 101, of the Revenue Act of 1928.

The total amount of contributions made during the taxable year 1928 by William Albert Harbison to organizations within the
44 provisions of section 23 (n) of the Revenue Act of 1928, was $27,996.83.

William Albert Harbison claimed as a deduction for charitable contributions in his tax return so filed the sum of $16,747.26, being an amount which did not exceed fifteen per centum of the sum of his "ordinary net income" and his "capital net gain", and paid a tax of $8,592.08.

(Signed) J. E. MacCloskey, Jr.
(Signed) J. E. MacCloskey, Jr.,
Counsel for Petitioner,
1712 Farmers Bank Building, Pittsburgh, Pennsylvania.

It is hereby stipulated and agreed between the parties to this proceeding, by their respective undersigned attorneys, that the foregoing is a statement of evidence in the above entitled case so far as is necessary to the assignments of error as filed, reduced to narrative form.

J. E. MacCloskey, Jr.,
Counsel for Petitioner.
E. Barrett Prettyman,
General Counsel, Bureau of Internal Revenue.

September 9, 1933.

Approved and ordered filed this 14th day of Sept., 1933.
(S.) Charles P. Smith,
Member.

45 Before United States Board of Tax Appeals

[Title omitted.]

Praecipe for transcript of record

Filed Sept. 16, 1933

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare, certify, and transmit to the Clerk of the United States Court of Appeals for the Second Circuit, with reference to Petition for Review heretofore filed by the Petitioner in the above cause, the transcript of the record in the above cause, prepared and transmitted as required by law and by the Rules of the said Court, and to include in the said transcript of record the following documents or certified copies thereof, to wit:

1. The docket entries of all proceedings before the Board of Tax Appeals.
2. Pleadings before the Board of Tax Appeals as follows:
(a) Petition for redetermination.
(b) Answer of respondent.
(c) Motion for consolidating case with Docket No. 54346.

46 (d) Motion and amended answer of respondent, filed April 22, 1932, and order thereon of July 13, 1932.

(e) Stipulation of parties as to the facts in the case.

3. Findings of fact and opinion of the Board of Tax Appeals, promulgated August 29, 1932.

4. Decision of the Board, entered March 7, 1933, deciding that there was a deficiency in the tax for the year 1928 due from the petitioner in the amount of $930.56.

5. Petition for review, filed by the petitioner in the above cause.

6. Order, entered July 21, 1933, extending the time for preparation of evidence and transmission and delivery of the record to October 4, 1933.

7. Statement of evidence, as stipulated to and agreed upon.

8. This praecipe.

(Signed) J. E. MacCloskey, Jr.
J. E. MacCloskey, Jr.,
Attorney for Petitioner,
1712 Farmers Bank Building, Pittsburgh, Pa.

[Clerk's certificate to foregoing transcript omitted in
47 printing.]

48 In United States Circuit Court of Appeals

For the Second Circuit

William Albert Harbison, petitioner

v.

Commissioner of Internal Revenue, respondent

Motion for substitution

Comes now the above-named petitioner and moves the court that Guy T. Helvering, Commissioner of Internal Revenue, be substituted for David Burnet, as respondent herein, and in support of said motion respectfully shows;

1. That the resignation of said David Burnet, who was Commissioner of Internal Revenue when the petition for review in this proceeding was filed, was duly accepted and he ceased to be such officer on May 15, 1933.

2. That Guy T. Helvering was duly appointed and confirmed as Commissioner of Internal Revenue to succeed the said David Burnet; that he qualified as such officer and entered upon the duties of said office on June 6, 1933, since which date the said Guy T. Helvering has been and now is Commissioner of Internal Revenue.

3. That there is a substantial need for continuing and maintaining this proceeding and obtaining an adjudication of the questions involved, for otherwise the order of the United States Board of Tax Appeals herein sought to be reviewed will become final and the right to have the legality thereof determined will be extinguished.

This motion is made pursuant to the provisions of section 11 of the act of February 13, 1925, c. 229, 43 Stat. 941 (U.S.C. title 28, sec. 780).

Dated June 7, 1933.

J. E. MacCloskey, Jr.,
Attorney for Petitioner.

The undersigned, attorney for Guy T. Helvering, Commissioner of Internal Revenue, hereby expressly consents to the substitution sought by the above motion.

Sewall Key,
Special Assistant to the Attorney General,
Attorney for Guy T. Helvering,
Commissioner of Internal Revenue.

In United States Circuit Court of Appeals

Order substituting party respondent

Upon motion of the petitioner, expressly consented to by Guy T. Helvering, Commissioner of Internal Revenue, it is hereby

Ordered that said Guy T. Helvering, as such officer, be, and he hereby is, substituted for David Burnet, former Commissioner of Internal Revenue, and that this proceeding be so continued and maintained.

Dated; August 31, 1933. Wm. Parkin, *Clerk.*

49 In United States Circuit Court of Appeals for the Second Circuit

No. 208—October Term, 1933

Argued December 20, 1933. Decided January 8, 1934

William Albert Harbison, petitioner

v.

Commissioner of Internal Revenue, respondent

Appeal from the United States Board of Tax Appeals

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

The taxpayer petitions for a review of an order of the Board redetermining a deficiency in income tax for the year 1928. Order reversed.

For the opinion below, see 26 B.T.A. 896.

J. E. MacCloskey, Jr., (Hugh Satterlee, of New York City, of counsel), for petitioner.

Sewall Key and J. P. Jackson, Sp. Assts. to Atty. Gen., for respondent.

Opinion

PER CURIAM:

The question presented is identical with that decided in Bliss v. Commissioner, — F. (2d) —, handed down herewith. For the reasons there stated, the order must be, and is, reversed.

L. HAND, Circuit Judge, dissents.

50 In United States Circuit Court of Appeals,
Second Circuit

WILLIAM ALBERT HARBISON, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appeal from the United States Board of Tax Appeals

Judgment

Filed January 15, 1934

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, reversed.

It is further ordered that a mandate issue to the said Board in accordance with this decree.

WM. PARKIN, *Clerk.*

51 [File endorsement omitted.]

52 [Clerk's certificate to foregoing transcript omitted in printing.]

53 In Supreme Court of the United States

No. 889. October term, 1933

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

v.

MARY COLGATE

Stipulation

It is hereby stipulated and agreed by and between the parties hereto through their respective attorneys that if this Court grants the petition for a writ of certiorari in the case of Guy T. Helvering v. William Albert Harbison, now pending on a petition for a writ of certiorari, a writ of certiorari shall also be granted in the present

case, and that if the writ of certiorari applied for in the Harbison case is denied, the writ applied for in the present case shall also be denied. If the writ of certiorari applied for in the Harbison case is granted, the parties stipulate and agree that the decision of this Court on the question of law in the Harbison case shall be deemed an adjudication of the same question of law in the present case, and that the parties hereto consent to the entry of judgment in the present case to the same effect as though the decision in the Harbison case were rendered by this Court in the present case. In view of this stipulation, the clerk need not print the record in the present case.

It is further stipulated and agreed by the Solicitor General that he consents to the filing by the attorney for Mary Colgate of a brief as amicus curiae in the Harbison case. The Solicitor General waives notice of a motion for leave to file such a brief, and this stipulation may be taken as a full and complete consent on his part to the filing of such a brief.

It is further stipulated and agreed that if the Harbison case should be decided other than on the merits of the question of law referred to above, the parties herein shall be remitted to their former rights to file briefs and to continue the prosecution of the present case independently of the Harbison case.

J. CRAWFORD BIGGS,
Solicitor General, Counsel for the Petitioner.
CARLYLE E. YATES,
Counsel for Mary Colgate.

MARCH 1934.

54 In Supreme Court of the United States

Order allowing certiorari

Filed April 30, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File No. 38, 491. U.S. Circuit Court of Appeals, second circuit. Term No. 888. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, *vs.* William Albert Harbison. Petition for a writ of certiorari and exhibit thereto. Filed March 23, 1934. File No. 888 O.T. 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1934